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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-630

ALBERT JAMES HASKINS,

Defendant and Petitioner,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ALBERT JAMES HASKINS,

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PETITION FOR WRIT OF CERTIORARI

Petitioner, ALBERT JAMES HASKINS, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 23, 1974, affirming the United States District Court for the Eastern District of California wherein the petitioner was convicted of violating 18 U.S.C. 1001 by willfully falsifying a material fact to an agency of the United States.

Petitioner alleges:

OPINIONS BELOW

The opinion(s) delivered in the Courts below have not been reported. The memorandum opinion of the Court of Appeals for the Ninth Circuit is not appended to this petition.

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked is that the Court of Appeals has decided two important questions of federal law which have not been, but should be settled by this Court. The date of the judgment in the District Court sought to be reviewed is January 14, 1974; the opinion of the Court of Appeals was entered on October 23, 1974.

The statutory provision believed by petitioner to confer on this court jurisdiction to review the judgment in question by writ of certiorari are Titles 28, section 1254 of the United States Code; also Rule 19 of Supreme Court Rules, also contained in Title 28 of the United States Code.

QUESTIONS PRESENTED

The questions presented for review are as follows:

A. Does the following rule, stated by the Supreme Court of California, apply to federal courts? "Where two statutes pertain to the same offense, and one is a special statute, and it would be impossible to violate the special statute without violating the general statute, then the special statute should control." To be more specific, if the special statute makes the conduct a misdemeanor and the general statute makes the conduct a felony, may the prosecutor exercise his discretion to determine whether to prosecute as a felony or as a misdemeanor?

B. If the defendant offers evidence of his good general reputation for truth, veracity, honesty and integrity, may the prosecutor on cross-examination ask whether the witness has heard about specific acts of misconduct on the part of the defendant? And if so, is it error to ask such questions, describing the alleged misconduct, in the presence of the jury when the answer is negative and when the prosecutor has no reason to believe the answer will be affirmative?

STATUTES INVOLVED

The statutes involved in this case are Title 18, section 1001 of the United States Code and Title 42, section 408c of the United States Code.

18 USC 1001 provides: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any truth, scheme, or device a material fact, or makes any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

42 USC 408c provides: Whoever at any time makes or causes to be made any false statement or representation of a material fact for use in determining rights to payment under this subchapter shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000.00 or imprisoned for not more than one year, or both.

CONCISE STATEMENT OF CASE

The facts material to the consideration of the questions presented are as follows:

Defendant is a medical doctor who received compensation through Medicare for services rendered by him to various patients. A fifteen count indictment was filed. The first count charged defendant with submitting request for payment forms to an agency of the United States "containing false statements and false representations consisting of a request for payment for medical services rendered to Carolyn Todd during the period August 1, 1968 through March 31, 1969 showing charges for 243 hospital visits made to said Carolyn Todd whereas, in truth and in fact as the defendant then knew such statement was false in that the correct number of hospital visits was an amount far less than that stated, in violation of Title 18, United States Code 1001 and Title 42 USC, 408(c)." Each of the other fourteen counts was the same except for the names of patients, periods and number of days involved. The total period involved in the fifteen counts was December 1, 1967 through April 25, 1969.

Defendant filed several motions, but the only motion pertinent to the issues raised here is that he moved to strike the allegation in each count charging him with violation of Title 18, Section 1001 of the United States Code. This was the felony count. The Court denied the motion, and instead struck the misdemeanor count, 42 USC 408(c).

The defendant claimed to have visited each of his patients on a daily basis. One of

the fifteen patients testified that the defendant had visited her on a weekly basis, although there was medical testimony that she was suffering from cerebral deterioration, senility, frequent lapses of memory and general confusion.

The other patients had all died or become unavailable. The proof that the doctor had not visited them was of three main types: (1) that a relative of a patient had visited the patient frequently and had seldom seen the doctor; (2) that various nurses had seen him at the hospital infrequently rather than on a daily basis; (3) that the "nurses' notes" which were supposed to show when a doctor was present, showed only a few visits by the doctor. However, the doctor produced several witnesses who testified that he visited his patients on a daily basis and he so testified himself. There was evidence that the nurses were often busy with patients and did not see the doctor unless he asked them to help him or accompany him -- which defendant seldom did. There was considerable evidence that the nurses' notes showing a doctor's presence were very poorly kept. Other records proved the doctor was there visiting patients many times when the nurses' notes indicated that he was not present.

Obviously this Court cannot weigh the evidence, and defendant is not asking it to do so. The reason for reciting the conflict in evidence is to show that it was a close case, and any error committed during trial would

tend to be prejudicial, especially an error which would discredit the doctor's own testimony. After deliberating almost 18 hours the jury found defendant guilty of one count, not guilty as to three counts, and there was a hung jury on the other eleven. The count where defendant was found guilty was the one where the patient testified.

Defendant called numerous character witnesses who testified that he was well liked a and respected, and that he had a good reputation for honesty and truthfulness. On cross-examination, the prosecution asked, "Have you heard that from June 1, 1968 Doctor Haskins was censured by the Foundation for Medical Care of Tulare County because he was performing tonsillectomies and adenoidectomies on medical patients far in excess of the average number performed by physicians in that area?" There was an objection each time the question was asked. After (not before) the first time the question was asked, there was an argument of the objection outside the presence of the jury, but the Court overruled it. The question was repeated after the testimony of each of the first several character witnesses.

In each case but one the answer was a clear-cut "no." In one case the answer was, "no," but the prosecution asked further questions and obtained a qualification to the denial. In one case the witness (Mary Sharp) was asked if she had heard anything derogatory about the

doctor's reputation. She said she had not. She was asked, "You have never heard any rumors?" It turned out that she had heard rumors only pertaining to the present case -- newspaper accounts regarding the charge defendant was being tried for. Nevertheless (over objection and after she had stated that this was the only thing derogatory she had heard) she was asked, "Have you heard that from June 1, 1968, Doctor Haskins was prohibited by the Foundation for Medical Care of Tulare County from performing tonsillectomies and adenoidectomies on Medi Cal patients because he was doing so far in excess of the average number performed by physicians in that area, and that he was prohibited from doing this without first obtaining prior approval?" The answer was essentially negative. The witness knew that charges were brought (the pending case) but didn't know about the "prohibition."

The basis for federal jurisdiction in the first instance is that defendant (petitioner) was charged with criminal violations of federal statutes.

ARGUMENT

Petitioner presents the following arguments in his behalf:

A. General or Special Statute

People v. Gilbert, 1 Cal. 3d 475 is a leading California case. The defendant was convicted under section 484 of the California Penal Code (a general statute defining theft, which includes false pretense, larceny and forgery) when defendant could have been prosecuted under section 11482 of the California Welfare and Institutions Code (a special statute making false statements to obtain welfare aid a misdemeanor). As stated in Gilbert, "Where two statutes pertain to the same offense, and one is a special statute, and it would be impossible to violate the special statute without violating the general statute, then the special statute should control," [citing In re Williamson, 43 Cal. 2d 651]. "It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment."

The defendant in People v. Lustman, 13 Cal. App. 3d 278, cert. denied, 405 U.S. 932 attempted to raise the special vs. general statute as a federal question, but his case was not a proper one to raise it because (a) California already recognized the doctrine, and (b) the Court found it inapplicable to the facts. As stated in the opinion of the Lustman case, "A special statute does not supplant a general statute unless all the requirements of

the general statute are covered in the special statute ....To constitute a violation of Penal Code section 484 and 487 by obtaining property by false pretenses, the following requirements must be met: (1) there must be an intent to defraud; (2) there must be actual fraud committed; (3) false pretenses must be used for the purpose of perpetrating the fraud; and (4) the fraud of false pretenses must have caused the owner to part with his property. A violation of Unemployment Insurance Code section 2101 requires the occurrence of only two of the four elements of theft by false pretenses. More specifically, the corpus delicti of a violation of section 2101 does not require that a person part with something of value. Thus, Penal Code section 484 and 487 are not in conflict with section 2101 of the Unemployment Insurance Code, and the two statutes may stand together.

If the Court of Appeals had analyzed our case in that manner, it would, undoubtedly, have found that 42 USC 408(c) was a special statute and 18 USC 1001 was a general statute. Instead the Court of Appeal determined the point in one sentence: "United States v. Chakmakis, 449 F.2d 315, 316 (5th Cir. 1971), establishes the validity of the felony charge against defendant."

It is, of course, possible that the federal courts do not recognize the doctrine of specail statutes v. general statutes at least in criminal proceedings. The Chakmakis case does not really analyze the problem. It just states the

conclusion: "Leaving aside the fact that the defendant was sentenced as for a misdemeanor, it is quite clear that the enactment of the later section did not repeal the former and that the facts of the alleged offense fell within the terms of either statute. Hence, the prosecution could have been brought under either, at the discretion of the prosecutor..." Several cases were cited, but the only one which discussed the theory of special vs. general statutes was the dissent in Berra v. United States, 351 U.S. 131. The dissent of Justices Black and Douglas raised the point which the California Supreme Court adopted many years later. The dissenting opinion says: "A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney for the Attorney General.....A congressional delegation of such vast power to the prosecuting department would raise serious constitutional questions...."

A dissenting opinion is obviously not controlling. However the majority opinion considered the point just mentioned as not having been raised.

The Espionage Act of 1917 gave the District judge unconditional power to impose the death penalty for violation of that Act. The

Atomic Energy Act of 1946 required an additional element of intent to injure the United States, and the judge could only impose the death penalty when it was recommended by the jury. The majority opinion in Rosenberg v. United States, 346 U.S. 213 recognized the doctrine of repeal by implication but said that the doctrine did not apply to the facts because the overt acts took place before the Atomic Energy Act of 1946 was passed. The dissent of Justice Black discussed the intent of Congress, and his conclusion was that Congress intended the latter act to apply, even as to acts which took place before its passage. The dissent of Justice Frankfurter emphasized the evil of allowing the prosecutor to elect which of two statutes to prosecute under. Justice Frankfurter stated: "Surely it needs only statement that with such a drastic difference in the authority to take life between the Espionage Act and the Atomic Engergy Act, it cannot be left within the discretion of a prosecutor whether the judge may impose the death sentence wholly on his own authority, or whether he may do so only upon recommendation of the jury. Nothing can rest on the prosecutor's caprice in placing on the indictment the label of the 1917 Act or of the 1946 Act....."

This is not a case where there is a clear-cut division of opinion between the majority and the dissenters. The majority did not say, "Where two statutes cover the same overt acts, the prosecutor may elect which act to prosecute under." The majority held that only the former Act was effective since, when the overt acts were committed

only the former statute had been passed. Needless to say, that situation does not exist in our case.

Petitioner believes that this issue of special vs. general statute, or the discretion of the prosecutor to elect which statute to prosecute under, has not been analyzed and intentionally decided in Chakmakis or any other federal case. In each case, the Court simply assumed that the issue (if it was properly raised) had already been determined, or in Berra and Rosenberg the majority of the Court did not believe that the issue was properly before the Court.

B. Cross-examination of Character Witnesses

The leading federal case is Michelson v. United States 335 U.S. 469, 69 S.Ct. 213. Following are some quotations from that case:

> "The law of evidence relating to proof of reputation in criminal cases has developed almost entirely at the hands of state courts of last resort, which have such questions frequently before them. This Court, on the other hand, has contributed little to this or to any phase of the law of evidence, for the reason, among others, that it has had extremely rare occasion to decide such issues, as the paucity of citations in this opinion to our own

writings attests. It is bovious that a Court which can make only infrequent sallies into the field cannot recast the body of the case law on this subject in many, many years, even if it were clear what the rules should be.

"We concur in the general opinion of Courts, text writers and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial Court. . .

"Since the whole inquiry, as we have pointed out, is calculated to ascertain the general talk of people about defendant, rather than the witness' own knowledge of him, the form of inquiry, 'Have you heard?' has general approval, and 'Do you know?' is not allowed. [citing other cases in footnote]. . .

"Wide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse."

Justice Rutledge, in his dissent (which Justice Murphy joined) said,

> "My own preference and, I think, the only fair rule would be to foreclose the entire line of inquiry concerning specific incidents in the defendant's past, both on cross-examination and on new evidence in rebuttal. This would leave room for proper rebuttal without turning the defendant's trial for a specific offense into one for all his previous misconduct, criminal or other, and would put the prosecution on the same place with the defendant in relation to the use of character evidence. This, it seems to me, is the only fair way to handle the matter."

Since, as was stated in Michelson, most of the case law regarding impeachment of character witnesses has been developed in the state courts, appellant feels justified in referring to and relying upon state court decisions. The Court mentioned that the law in Illinois was opposed to the law stated by the Court in Michelson. But before we leave Michelson, note the warning, "Wide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse." In North Carolina a character witness may be asked on cross-examination about the "General reputation of the defendant as to particular vices or virtues," but not about rumors of

specific acts of misconduct. State v. Shephard, 220 N.C. 477, 17 SE2d 469. The Arizona Supreme Court used to have the rule adopted by the U.S. Supreme Court in Michelson but reversed a judgment because a character witness was cross-examined as to his knowledge of specific acts of misconduct, stating that cross-examination should be limited to questions concerning the source of the witness' knowledge of the accused's reputation and should not include questions concerning specific acts of misconduct. Vilbroghi v. State, 45 Ariz. 275, 43 P.2d 210.

In People v. Eli, 66 Cal.2d 63 the prosecutor asked on cross-examination whether the character witness had heard that in 1962 the defendant forced his girl friend to watch him masturbate. The Court said,

> "The repulsive nature of the act, if indeed it occurred, is certain to affect opinion of the defendant. But the issue is reputation in the community (Witkin, Cal Evidence 2d ed. 1966, section 1238), and it is highly unlikely that a sex act committed in privacy would become a topic of general community comment unless legal action had resulted therefrom. The record does not indicate any proceedings resulting from this incident. The second question concerned an involved plot in which the defendant purportedly

planned to assault and rape a girl. Since the scheme did not materialize, an objection to the question was properly sustained; but the jury heard the query, one in a cumulative series designed to reflect upon defendant's reputation. This is a valid illustration of Justice Rutledge's criticism in his dissent in Michelson, supra (335 U.S. at page 492): 'Many incidents, wholly innocent in quality, can be turned by the prosecutor, through an inflection or tone, to cast aspersion upon the defendant by the mere asking of the question, without hope of affirmative response from the witness.'

"Counsel must not be permitted to take random shots at a reputation imprudently exposed, or to ask groundless questions 'to waft an unwarranted innuendo into the jury box.' (Michelson, supra, 335 U.S. at page 481). To avoid excesses in efforts to destroy or rehabilitate character evidence, trial courts are invested with discretion to limit the number of witnesses on the subject and to control cross-examination. There is also a responsibility on trial courts to scrupulously prevent cross-examination based upon mere fantasy. This may best be done by first ascertaining outside the presence of the jury, 'that the target of the question

> was an actual event, which would probably result in some comment among acquaintances if not injury to defendant's reputation.'"

Let us consider how the general principles set forth in Eli apply to our case. First, the letter to the defendant from the Foundation, like Eli's masturbating before his girl friend, is not the type of thing which would become a topic of general community comment. The letter was, and should be, a confidential communication. It was very unlikely that the character witnesses would know about it, and there was a very remote chance that the witnesses would answer the prosecutor's questions affirmatively. In theory the jurors should not consider an assertion of fact in a question as evidence, and the jurors were so instructed (section 11.04 Devitt and Blackmar, F.J.P.I.). But what purpose did the prosecutor have in asking questions, knowing the answer would be "no" except for prejudicing the jurors? It is considered prejudicial to ask a witness whether he has been convicted of a felony unless the questioner has information and a good-faith belief that the answer will be "yes." In our case, in addition to the improbability that the witnesses would have heard about the letter, and therefore would give an affirmative response, in some cases the prosecutor had already ascertained that the witness had heard nothing derogatory and he still asked the question. Furthermore, he did not first ask the question outside the presence of the jury as recommended in Eli.

The Government has argued that all of the facts regarding the alleged censure eventually came out. Consequently the jury was not *misled and no harm was done.*

This argument overlooks several factors. First, single acts of misconduct, not amounting to felonies, may not be proven under the guise of impeachment. The whole subject should never have been brought before the jury. Defendant attempted to minimize the harm done by calling the author of the "censure letter" to establish the facts, but defendant was improperly placed on the defensive.

If the Government could not prove that defendant was "censured," it should not be allowed to suggest it by innuendo. The rules regarding reputation are archiac and illogical. But even according to those rules, (a) the judge is supposed to protect the witness from abuse by improper cross-examination, and (b) the prosecution should not be able to prove by insinuation and innuendo what it cannot prove directly.

If there was a rumor circulating around that defendant had been censured so that anyone who had not heard it would not know defendant's true reputation in the community, then, on the basis of the archiac rules we have, it would be logical to allow the cross-examiner to ask the witness if he had heard such a rumor. Not having heard it would show that he was not truly acquainted with defendant's reputation. If he had heard it and not mentioned it, it would tend to prove the witness

was dishonest. But there had to be a rumor circulating to justify asking questions about it. There could not have been a rumor because the letter was a confidential communication. Furthermore the prosecutor knew that the answer to each question about knowledge of the rumor would be negative.

The evidence clearly shows there were no "rumors" that the witnesses would have heard regarding the purported censure; the prosecutor knew the answer to his questions would be no; yet he asked the questions to insinuate a fact which he could not prove. There was no other conceivable purpose for asking the questions. The reasoning of the California Supreme Court in People v. Eli, 66 Cal. 2d 63 is persuasive. A series of cumulative questions designated to reflect upon defendant's reputation constitute error when they are asked without hope of affirmative response from the witness.

CONCLUSION

Petitioner respectfully requests that this Court order a reversal of petitioner's conviction.

Respectfully submitted,

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SUPREME COURT, U. S.
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APPENDIX A

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

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U. S. Court of Appeals

UNITED STATES OF AMERICA,	)	
Appellee,	)	No. 74-1691
v.	)	
ALBERT JAMES HASKINS,	)	
Appellant.	)	MEMORANDUM

Appeal from the United States District Court
For the Eastern District of California

Before: BARNES and HUFSTEDLER, Circuit Judges, and EAST, District Judge*

*Honorable William G. East, Senior Judge, District of Oregon, sitting by designation.

Appellant, a doctor of medicine, was charged in a fifteen count indictment with making false Medicare claims for his charges to a government agency, a violation of 18 U.S.C. §1001. Appellant was convicted of the first count only -- the sole count on which an alleged patient testified.

Count I charges Dr. Haskins presented claims for 243 hospital calls allegedly made between August 1, 1968 and March 31st, 1969 (a 243 day period) on one Carolyn Todd, a patient in "custodial or extended care" (not "acute care"), in the Lindsay (California) District Hospital.

Appellant claims four errors --

I. That he was not advised of the charges against him in a manner that enabled him to prepare his defense;

II. That there was no assurance the jurors found that appellant failed to attend Mrs. Todd on the same days;

III. That the charges against him should have been charged as a misdemeanor, not a felony;

IV. That the prosecutor was guilty of misconduct by questioning witnesses' knowledge of a "censure" of appellant after he had presented character witnesses on his behalf.

We find no merit in any of appellant's alleged errors, and affirm.

I. Sufficiency of Indictment.

The indictment is set forth in the margin.[1]

> "The test of the sufficiency of an indictment is whether it (1) has all elements of the offense charged; (2) properly apprises defendant of what he must meet in preparation of defense; and (3) enables him to plead double jeopardy in subsequent prosecutions. Hagner v. United States, 285 U.S. 427, 431 (1932)."

United States v. Goodman, 457 F.2d 68, 73 (9th Cir.) cert. denied, 406 U.S. 961 (1972). We feel the indictment is sufficient to meet these tests.

II. Jurors' Finding on Acts Charged.

The defendant was charged with presenting his bills for payment during the 210 days between September 16, 1968 and April 14, 1969, covering 243 visits allegedly made by him to Mrs. Todd during the period from August 1, 1968 to March 31st, 1969 (243 days).

The record before us discloses the following evidence:

(a) Mrs. Todd testified appellant did not visit her daily, but "kept track of me on a weekly basis." (b) Marguerite Page testified different rates were paid by Medicare for doctors' visits in hospital (code "IH"), and for doctors' visits in an extended care facility (code "ECF"), or for a nursing home visit (code "NH"). The claims filed by appellant were marked "IH". Mrs. Todd was not in "IH" during the period involved. (c) While both sides conceded the Lindsay Hospital notes were not completely accurate, the Medicare Records Librarian from the hospital testified the records disclose the patient, Mrs. Todd, was visited by appellant 26 times in 31 weeks (August 1, 1968 to March 31, 1969). (d) Mrs. Infante, Supervisor of day nurses in the extended care facility (ECF) of the Lindsay Hospital testified defendant visited Mrs. Todd "about once a month." (e) Claudia Butterbaugh, an ECF day nurse, testified the defendant visited his patients there "two - three - maybe four times a month." (f) Mary Bergman, an ECF night nurse testified she saw defendant visit his ECF patients not "more than once or twice a month on a regular basis." (g) Another physician testified that during December, 1967 and January, 1968, while defendant was in New Zealand for several weeks, the testifying physician saw defendant's patients in ECF "approximately once a week."

This evidence before the jury, if believed, was sufficient to convict defendant. The jury was required to weigh all conflicts. On appeal

we are required to view the evidence "in the light most favorable to the government." Glasser v. United States, 315 U.S. 60, 80 (1942). United States v. Matanky, 482 F.2d 1319, 1322 (9th Cir. 1973); United States v. Kraude, 467 F.2d 37, 39 (9th Cir.) cert. denied, 409 U.S. 1076 (1972); Kaplan v. United States, 379 F.2d 561 (9th Cir. 1964); United States v. Katz, 455 F.2d 496, 498 (5th Cir. 1972).

We cannot retry the case.

III. Felon vs. Misdemeanor.

United States v. Chakmakis, 449 F.2d 315, 316 (5th Cir. 1971), establishes the validity ofthe felony charge against defendant.[2/]

IV. The Alleged Misconduct of the Prosecution.

This issue presents a more difficult problem than those issues hereinabove considered (particularly because of the indefiniteness of the meaning of a "censure" imposed by a medical group which may be composed of "competing" physicians in the same community.) Nevertheless, we still must recognize what the Supreme Court has stated in discussing the problem of the cross-examination of character witnesses.

> "The price a defendant must pay for attempting to prove his good name is to throw open the entire

> subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses to show that damaging rumors, whether or not well-grounded, were afloat - for it is not the man that he is, but the name that he has which is put in issue. Another hazard is that his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion." Michelson v. United States, 335 U.S. 469, 479 (1948).

This was not a "shot in the dark" question asked of the witnesses. There was some basis for the inquiry, although it was not an ideal question for impeachment.

However, in view of the detailed explanation made to the jury as to what basis there was for the "censure" and by reason of the careful instruction given by the trial judge on the subject, we are convinced, on balance, that any error that might have occurred (if any did), in connection with the cross-examination of character witnesses for the defendant, was harmless error, within the holding of Chapman v. California, 386 U.S. 18 (1967).

We affirm the conviction.

FOOTNOTES:

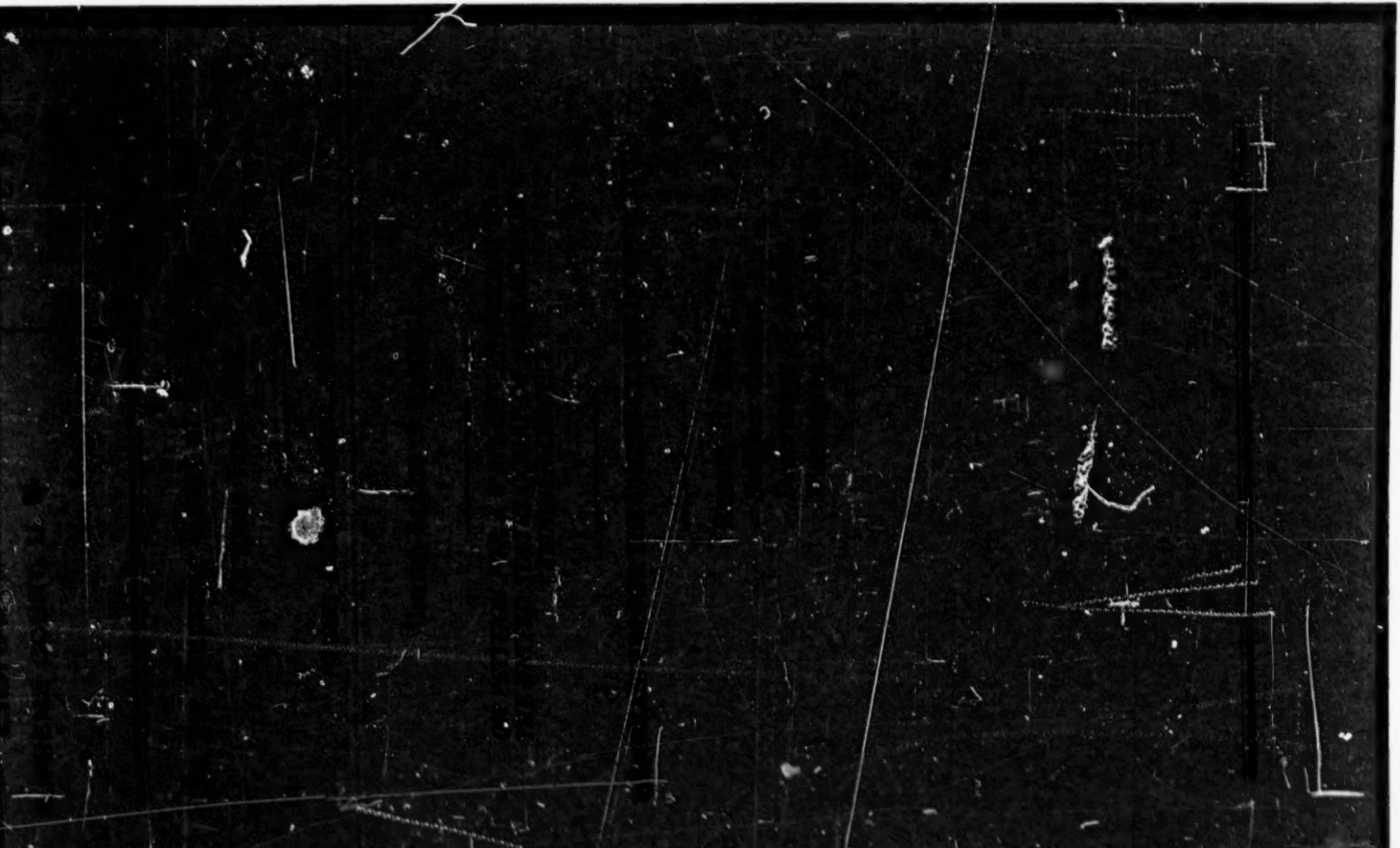
1/ The Grand Jury charges:

THAT

"On or about September 16, 1968 and continuing to on or about April 14, 1969, in Tulare County in the Eastern District of California, ALBERT JAMES HASKINS, M.D., defendant herein, for the purpose of causing payments to be made to ALBERT JAMES HASKINS, M.D., in amounts greater than the amounts which were properly payable and authorized under Title XVIII of the Social Security Act (42 USC 1395), knowingly, willfully, and unlawfully made and caused to be made false statements and false representations of material facts for use in determining rights to payments in that the said ALBERT JAMES HASKINS, M.D., did submit and caused to be submitted, requests for payment forms (Form SSA - 1490a) to an agency of the United States under the Health Insurance for the Aged Act, containing false statements and false representations consisting of a request for payment for medical services rendered to Carolyn Todd during the period August 1, 1968 through March 31,

1969, showing charges for 243 hospital visits made to the said Carolyn Todd; whereas, in truth and in fact as the defendant then knew such statement was false in that the correct number of hospital visits was in an amount far less than that stated; in violation of Title 18, United States Code, 1001."

2/ "The appellant says that he should have been indicted and prosecuted under another Section of the Code, i.e., 42 U.S.C. §408(c), which was enacted subsequently to 18 U.S.C. §1001 and which denominates the conduct charged as a misdemeanor only. Leaving aside the fact that the defendant was sentenced as for a misdemeanor, it is quite clear that the enactment of the later section did not repeal the former and that the facts of the alleged offense fell within the terms of either stature. Hence, the prosecution could have been brought under either, at the discretion of the prosecutor [citations omitted]." United States v. Chakmakis, supra, 449 F. 2d at 316.



In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-630

ALBERT JAMES HASKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that he should have been prosecuted for a misdemeanor under 42 U.S.C. 408(c) rather than for a felony under 18 U.S.C. 1001 and (2) that the court erred in permitting the government to cross-examine his character witnesses regarding a letter, which questioned certain of his medical practices, sent to him by a local medical organization.

Petitioner was originally charged in a fifteen-count indictment with having made false Medicare claims, in violation of 18 U.S.C. 1001 and 42 U.S.C. 408(c). The individual counts in the indictment covered claims submitted by petitioner for fifteen different patients during the period from approximately December 1, 1967, through April 25, 1969. By the time of trial, all but one of the fifteen patients specifically referred to in the indictment had either died or otherwise become unavailable. The fifteenth pa-

tient—Carolyn Todd— did testify, however; and petitioner was ultimately convicted by a jury in the United States District Court for the Eastern District of California of having made false claims for the services rendered by him to Mrs. Todd, in violation of 18 U.S.C. 1001. Petitioner was sentenced to one year's imprisonment and fined $10,000. The court of appeals affirmed (Pet. App.).

The evidence adduced at trial showed that petitioner, a medical doctor, submitted Medicare bills for payment covering 243 visits allegedly made by him to Mrs. Todd during the period from August 1, 1968, through March 31, 1969—a period of 243 days (Tr. 97-98). Mrs. Todd testified that petitioner had not visited her every day, as he had claimed, but had "kept track of [her] on a weekly basis" (Tr. 400). Another witness testified that doctors were permitted, without special authorization, to charge Medicare for two routine visits per month to patients in extended care facilities but that there were no comparable limits on the number of chargeable visits to patients in acute care facilities (Tr. 422-424). The bills submitted by petitioner for his visits to Mrs. Todd were coded to indicate that he visited her in an acute care facility when in fact she was at the time in an extended care facility (Tr. 399-400). Various other witnesses testified that petitioner visited Mrs. Todd in the extended care facility between once per week and once per month, rather than daily (Tr. 117, 195, 255, 317).

1. Petitioner first contends that he should have been prosecuted for a misdemeanor under 42 U.S.C. 408(c) rather than for a felony under 18 U.S.C. 1001. This contention was specifically rejected in *United States* v. *Chakmakis*, 449 F.2d 315 (C.A. 5). Since petitioner's fraudulent conduct fell within the provisions of both statutes, the government, in its discretion, could elect to prosecute under the statute providing for the harsher penalty.

See *United States* v. *Gilliland,* 312 U.S. 86, 95-96; *United States* v. *Fournier,* 483 F.2d 68, 69 (C.A. 5); *United States* v. *Brown,* 482 F.2d 1359, 1360 (C.A. 9); *Mauney* v. *United States,* 454 F.2d 273, 274 (C.A. 6); *United States* v. *Eisenmann,* 396 F.2d 565, 568 (C.A. 2).

2. Petitioner also contends that the government improperly cross-examined his character witnesses regarding a letter sent to him by a local medical organization, the Foundation for Medical Care of Tulare County ("Foundation"). During the trial, petitioner introduced several character witnesses who vouched for his honesty and integrity. On cross-examination the government asked these witnesses whether they had heard that the Foundation had sent petitioner a letter of reprimand in connection with his services to Medi Cal patients (Tr. 492, 494, 545-547, 555-556, 565, 570-571, 575).[1] The thrust of the letter was to prohibit petitioner from performing certain types of surgery on Medi Cal patients without receiving prior authorization.[2]

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[1]Each character witness was asked substantially the following question (Tr. 556):

> Have you heard that from June 1, 1968, Doctor Haskins was prohibited by the Foundation for Medical Care of Tulare County from performing tonsillectomies and adenoidectomies on Medi Cal patients because he was doing so far in excess of the average number performed by physicians in that area, and that he was prohibited from doing this without first obtaining prior approval?

The government initially characterized the letter from the Foundation as a "censure" (Tr. 492, 494). After objection, the court instructed the jury to disregard the government's use of the word "censure," and thereafter the government characterized the letter as a "prohibition" (Tr. 547, 555-556, 565, 570-571, 575). However the letter might appropriately be characterized, the fact remains that the limitations imposed on petitioner in connection with surgeries performed by him under the Medi Cal program were at the time highly unusual (Tr. 586, 597-598).

[2]A copy of the letter appears in the trial transcript at pages 500-501.

Once petitioner had called character witnesses, the government was entitled to test the reliability of their testimony by asking specific questions relevant to the character traits vouched for on direct examination. As this Court noted in *Michelson* v. *United States,* 335 U.S 469, 479:

> The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses to show that damaging rumors, whether or not well-grounded, were afloat—for it is not the man that he is, but the name that he has which is put in issue. Another hazard is that his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion.

Petitioner's reputation for honesty and integrity would undoubtedly have been damaged by his having been reprimanded publicly by a local medical body for having performed too many surgeries. This is not a case, therefore, in which the question asked of petitioner's character witnesses on cross-examination was irrelevant to the character traits petitioner put in issue. Neither is this a case in which a groundless question was asked by the government in order "to waft an unwarranted innuendo into the jury box." *Michelson* v. *United States, supra,* 335 U.S. at 481. The letter that formed the basis of the government's cross-examination of petitioner's character witnesses was in the government's possession before any questions involving it were asked, and a copy of the letter was made immedi-

ately available to petitioner. At no time, moreover, has petitioner suggested that he did not receive the letter. Cf. *United States* v. *Machado*, 457 F.2d 1372, 1376 (C.A. 9); *United States* v. *Beno*, 324 F.2d 582, 588 (C.A. 2), certiorari denied, 379 U.S. 880. Petitioner's sole objection to the government's use of the letter is instead that it was highly unlikely that any of his character witnesses would have heard about it, since it "was, and should be, a confidential communication" (Pet. 18).

Whether the letter should have been kept confidential is irrelevant, however, to the issue of whether it was properly used by the government. In fact, the letter was not kept confidential. In addition to sending a copy of the letter to petitioner, the Foundation also sent a letter to the hospital at which petitioner was authorized to perform surgery, informing it of the action taken by the Foundation. The reason for this was that, if petitioner did not respect the terms of the letter and performed certain types of surgery on Medi Cal patients without prior authorization, subsequent Medi Cal payments to the hospital would have been affected (Tr. 502).

Petitioner's claim that the letter was kept confidential is also inconsistent with the admission by one of his character witnesses that she was generally familiar with its contents. On cross-examination, petitioner's first character witness was asked whether she had heard that petitioner had been prohibited from performing certain types of surgery without prior authorization. She responded as follows (Tr. 494):

> A. I didn't know what the problem was; I knew there was some talk around that Medi Cal or Medicare or somebody was censuring him, or trying to obtain information about him.

In these circumstances, the question put to petitioner's character witnesses by the government concerning the Foundation's letter was entirely proper. The question was used to test the reliability of those witnesses' testimony, and the jury was fully capable of determining whether any lack of knowledge of such communication undermined the particular witness's evaluation of petitioner's reputation in the community.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General

FEBRUARY 1975.